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In the Supreme Court of the United States

OCTOBER TERM, 1984

GERALD W. MOODY, Debtor-in-Possession,

Plaintiff-Appellant-Petitioner,

vs.

AMOCO OIL COMPANY,

Defendant-Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Seventh Circuit Court of Appeals err in holding that Amoco had sufficient grounds under the PMPA for terminating Moody's dealership contracts based on Moody's financial distress where Moody failed to cure more than $18,000.00 worth of bad checks and was already indebted to Amoco in an amount in excess of $270,000.00?

2. Did the Seventh Circuit Court of Appeals err in holding that Moody could not assume dealership contracts which had been terminated under the PMPA prior to Moody's filing for bankruptcy, when the effective date of the terminations was post-bankruptcy?

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I. THIS PETITION DOES NOT PRESENT A PROPER CASE FOR SUPREME COURT REVIEW.

A. Petitioner Does Not Explain Why The Supreme Court Should Review This Case.

Petitioner Moody never explains why this Court should review this case. Rather, Moody relies upon the conclusory statements that this case "presents novel and important issues" and that review "is appropriate for the reasons

articulated in Supreme Court Rule 17(1)(a) and (c)." Moody does not explain why the issues are novel and important or why review is appropriate under the rules of this Court.

Rather than explaining how this case presents a serious federal question, Moody simply complains that the Seventh Circuit Court of Appeals was wrong in its analysis of the facts. The central issue in this case, as shown by Moody's statement of questions for review, is whether Moody had evidenced such financial distress as to justify termination of his contracts by Amoco Oil Company ("Amoco").[1] This is largely a question of fact. Moody's arguments were considered and rejected by the bankruptcy court and the district court, as well as the Seventh Circuit. This Court should not become involved in yet another review of those same facts. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *Rice* v. *Sioux City Memorial Parks Cemetery*, 349 U.S. 70, 74 (1955). This case is of further interest only to Moody.

B. The Considerations Of Supreme Court Rule 17(1)(a) Are Not Applicable.

Rule 17(1)(a) states the following as indicating the character of reasons that will be considered on a petition for review on writ of certiorari:

> "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial pro-

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[1] In accordance with Supreme Court Rule 28, the parent company of Amoco is Standard Oil of Indiana. The affiliates and subsidiaries of Amoco are listed in the Supp. App., pp. 6-8.

> ceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

The present case presents no conflict with another federal court of appeals or with a state court of last resort. Clearly, there has been no departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Therefore, Rule 17(a)(1) is not applicable.

C. The Considerations Of Supreme Court Rule 17(1)(c) Are Not Applicable.

Rule 17(1)(c) provides that a review on writ of certiorari will be considered:

> "(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

This case did not decide a federal question in a way in conflict with any decision of this Court. Therefore the only possible remaining consideration under Rule 17(1)(c) is that this case presents an important question of federal law which has not been, but should be, settled by this Court. That consideration also is not applicable. Contrary to Moody's position, this case does not present questions of conflict between the PMPA and the Bankruptcy Code. While issues were considered under both statutes, the issues were wholly separate and distinct.

On February 3, 1983, Moody's contracts with Amoco were terminated by Amoco. That action by Amoco presented a question arising under Title I of the Petroleum Marketing Practices Act of 1978 ("PMPA"), 15 U.S.C. § 2801-06. (App. at 48-57) The PMPA governs the termination of petroleum franchises. Therefore, the bank-

ruptcy court, as well as the district court and Seventh Circuit, applied the PMPA to the facts of the case. Moody's subsequent filing for bankruptcy was irrelevant to that analysis. The sole issue was whether the terminations were proper under the PMPA. Indeed, the propriety of the terminations would, in all likelihood, have been litigated regardless of whether bankruptcy petitions had been filed.

On February 4, 1983, Moody filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. Section 365 of the Bankruptcy Code governs the right of a debtor to assume an executory contract. Therefore, the bankruptcy court, as well as the reviewing courts, had to assess the status of Moody's contracts with Amoco as of the bankruptcy filing and decide whether Moody had the right to assume the contracts. The PMPA does not provide a right to assume a terminated contract. This was purely a question of bankruptcy law and was not affected by the PMPA. The sole issue was whether the contracts were assumable under the terms of the Bankruptcy Code.

The conflict which Moody sees between the PMPA and the Bankruptcy Code simply does not exist under the facts in this case.

Moody also states, without further discussion, that this Court should review this case because it involves the PMPA, "a significant piece of legislation which this Court has yet to address." Moody's Petition at i and 25. That, in itself, does not make this case appropriate for review. Presumably there are many other significant pieces of legislation which have not yet been addressed by this Court. Those pieces of legislation, together with the PMPA, will be reviewed by this Court in due time, in conjunction with cases in which the facts reveal a difficult and significant problem of interpretation or application. This is not such a case.

D. The Seventh Circuit's Decision Is Consistent With The Holding Of All Other Reported Cases.

Even if this Court were to find that an important federal question has been presented, review by this Court is not necessary. The Seventh Circuit did a thorough and well-reasoned analysis and its decision is consistent with other reported cases presenting similar issues. Those cases are discussed *infra*.

II. THE DEALERSHIP CONTRACTS WERE FULLY TERMINATED PRE-BANKRUPTCY AND WERE NOT ASSUMABLE UNDER 11 U.S.C. § 365.

The Seventh Circuit was correct in concluding that the dealership contracts could not be assumed under section 365 because the contracts had been terminated pre-bankruptcy. A debtor may assume a contract under section 365 only if there is a "viable and existing executory contract" on the date the petition for relief is filed. *Matter of New Media Irjax, Inc.*, 19 B.R. 199, 201 (Bankr. M.D. Fla. 1982). The dealership termination notices were effective before Moody filed for bankruptcy.[2] (App. at 21) Moody does not challenge this finding. The only question which remains is whether there was any way for Moody to cure, and thus avoid termination, after the termination notices were issued. If so, he would still have sufficient interest in the contracts to allow them to be reinstated under section 365(a). *See Matter of Easthampton Sand & Gravel*

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[2] The contracts between the parties provided that "[t]he postmark date shall be the date of any notice sent by certified mail." App. at 20. The termination notices were mailed on February 3, 1983. (App. at 7) The Seventh Circuit therefore ruled that the notices "were effective when they were mailed, before the debtors filed for bankruptcy." (App. at 21)

Co., 25 B.R. 193, 197 (E.D.N.Y. 1982); 2 *Collier on Bankruptcy* ¶ 365.02-.03 (L. King, 15th ed. 1984). If not, the termination was complete pre-bankruptcy and the contracts could not be assumed. *Matter of Triangle Laboratories, Inc.*, 663 F.2d 463, 467-68 (3d Cir. 1981).

The termination process began when Amoco notified Moody by certified letter dated January 27, 1983, that certain checks which he had written to Amoco had been dishonored. The notice demanded, pursuant to the terms of the contracts between the parties, that Moody cure the dishonored checks within five days. The notice also stated that Amoco would consider all remedies available pursuant to its contracts with Moody if he failed to cure the checks. (Supp. App. at 1) The contracts provided for termination in the event of a failure to cure. (App. at 37, Lease ¶ 16 (a))

The five days expired and the termination notices were given before February 4, 1983, when Moody filed his bankruptcy petitions. Moody does not claim any additional right to cure under state law. Thus, since the termination notices were effective before February 4, 1983, and since there was no way for Moody to cure, the contracts were fully terminated pre-bankruptcy.

Moody argues that the contracts remained "fully executory" because the so-called "effective" date of the terminations was 89 days after he filed his chapter 11 petitions. The Seventh Circuit had abundant authority for rejecting Moody's argument. *See, e.g., Matter of New Media Irjax, Inc.*, 19 B.R. 199, 200-01 (Bankr. M.D. Fla. 1982); *In re Benrus Watch Co.*, 13 B.R. 331, 333-34 (Bankr. S.D.N.Y. 1981); *In re Beck*, 5 B.R. 169, 170-71 (Bankr. D. Hawaii 1980); *see also Matter of Schokbeton Industries, Inc.*, 466 F.2d 171, 176-77 (5th Cir. 1972); *In re Nashville White*

Trucks, Inc., 5 B.R. 112, 116-17 (Bankr. M.D. Tenn. 1980). Moody never comes to grips with this authority.

Moody's only argument is that the Seventh Circuit's reliance on *In re Anne Cara Oil Co., Inc.*, 32 B.R. 643 (Bankr. D. Mass. 1982) is misplaced. The Seventh Circuit cited *Anne Cara only* in support of the proposition that the automatic stay created by section 362 does not toll the mere running of time under a contract and therefore does not prevent termination of the contract. (App. at 23) Given its very limited reference to *Anne Cara*, it is apparent that the Seventh Circuit did not read the dicta in *Anne Cara*, on which Moody relies, as either a clear or an accurate statement of the law on other points.

In *Anne Cara*, the effective date of termination passed without the debtor making any attempt to assume the contract. Therefore, the court held that the contract could not be assumed. Clearly, the Seventh Circuit saw that *Anne Cara* did not involve the question raised by Moody and thus did not control disposition of this case. The bankruptcy court's dicta in *Anne Cara* simply does not present a conflict with the Seventh Circuit's decision or with the numerous other cases on which the Seventh Circuit relied.

Even if those portions of *Anne Cara* on which Moody relies were not mere dicta, *Anne Cara* is fraught with inconsistencies. On the one hand, the court recognized that as of the commencement of the chapter 11 case, the estate contained a franchise relationship with a remaining term of one day. The court then emphasized that the Bankruptcy Code does "not . . . grant the debtor . . . greater rights or powers under the contract than he had outside of bankruptcy" and that there is nothing in the Code which enlarges the debtor's rights or prevents the termination of a contract on its own terms. *Id.* at 647.

On the other hand, the court stated, in dicta, that some affirmative action on the part of the debtor was needed to "prevent" his contract from terminating. *Id.* The two positions are incompatible. Further, the *Anne Cara* court made no attempt to discuss the numerous cases which have held that contracts terminated pre-bankruptcy, with a post-bankruptcy effective date for termination, cannot be assumed. The Seventh Circuit correctly read *Anne Care* as a case which must be limited to its narrow holding: There was nothing left for the debtor to assume after his contract had expired by its own terms. *Id.* at 648. Moody's selective reading of *Anne Cara* is an unconvincing effort to illustrate that the Seventh Circuit erred.

Moody also seeks to conjure up a conflict which this Court should address by citing a series of mortgage foreclosure cases arising under chapter 13 of the Bankruptcy Code, specifically 11 U.S.C. §§ 1322(b)(2), (3) and (5). Contrary to Moody's reading of *Matter of Clark,* 738 F.2d 869 (7th Cir. 1984), *Grubbs* v. *Houston First American Savings Assoc.,* 730 F.2d 236 (5th Cir. 1984), and *In re Taddeo,* 685 F.2d 24 (2d Cir. 1982), none of those cases involved an executory contract and none of those cases produced a "holding" under section 365.[3] The mortgage foreclosure cases stand only for the proposition that a mortgage which has been accelerated based on a default is subject to deacceleration under sections

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[3] Significantly, Congress noted that a promisory note is not usually an executory contract. S. Rep. No. 95-989. 95th Cong. 2d Sess., 58, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5884. *Compare Clark, Grubbs* and *Taddeo* with *In re Beck,* 5 B.R. 169, 170-71 (Bankr. D. Hawaii 1980) and *Matter of New Media Irjax, Inc.,* 19 B.R. 199, 200-01 (Bankr. M.D. Fla. 1982), the cases upon which the Seventh Circuit relied. *Beck* and *Irjax* involved executory contracts and arose under section 365, the section involved in this case.

1332(b)(2), (3) and (5). *Taddeo,* 685 F.2d at 26; *Grubbs,* 730 F.2d at 238. This right is available to the debtor so long as he retains an interest in the property under state law. *Clark,* 738 F.2d at 871, 874.[4] Contrary to Moody's characterization, this is not tantamount to a holding that a contract that is fully terminated before a debtor files for relief may be revived under section 365.

The Seventh Circuit quite properly dealt with *Taddeo.* The fact that the debtor could have avoided foreclosure under state law by paying off the mortgage showed that the debtor still had an interest in the property. This entitled him to exercise the right of cure created by section 1322(b). Reinstatement of the mortgage was controlled by bankruptcy law; the debtor was not limited to state law remedies. Moody ignores this distinction and misconstrues the reason for looking to state law where he argues that the Seventh Circuit improperly distinguished *Taddeo.*

Moody's attempts to equate section 1322(b)(5) to section 365 are unpersuasive. Section 1322(b)(5) governs treatment of *claims* under a chapter 13 plan. It does not deal with assumption of executory contracts. In contrast, section 365 specifically governs assumption of executory contracts. Where Congress has enacted a provision specif-

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[4] The Seventh Circuit's reversal of the district court's opinion in *Clark* is of no consequence. The Seventh Circuit's decision in this case did not turn on its reading of the district court's opinion in *Clark.* Moreover, *Clark* was reversed because under state law, the mortgage was not fully terminated. The district court had not looked to state law, but instead had concluded that entry of a foreclosure judgment extinguished the right to cure under section 1322 (b). *Matter of Clark,* 32 B.R. 711, 715 (D.C. Wis. 1983), *rev'd,* 738 F.2d 869 (7th Cir. 1984). The Seventh Circuit's decision in *Clark* does not conflict with the rule that a fully terminated contract may not be revived.

ically dealing with the issue at hand, that provision should be applied. There is a large body of well-developed case law under section 365. Simply stated, section 1322(b) and the case law developed thereunder are not relevant to the present case.

The Seventh Circuit's decision also does not subvert the policies underlying the Bankruptcy Code. It does not prevent debtors from seeking timely relief in bankruptcy to prevent termination of executory contracts. This is perhaps best illustrated by the fact that the jobbership contract which Moody's corporation, Jermoo's Inc., had with Amoco now enjoys the protections of the Bankruptcy Code.[5] (App. at 29) Moody's emphasis on the need for an opportunity to cure important executory contracts ignores the opportunity to cure which he was given under his contracts with Amoco. Moody knew he was in default, knew he had five days to cure and knew that termination could result from a failure to cure.[6] He could have prevented termination by filing his petitions during the cure period, as he did with the jobbership. His decision not to do so is insufficient to invoke the intervention of this Court.

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[5] Since the cure time with respect to the jobbership contract had not expired when Moody filed his petitions, the Seventh Circuit held that the contract was executory and could be assumed. (App. at 29)

[6] Moody tries to create the impression that he did not know that his failure to cure the bad checks would trigger termination. (Moody's Petition at 11 n.6.) The fact is that Moody knew. (App. at 37, Lease ¶ 16a)

III. THE SEVENTH CIRCUIT CORRECTLY CONCLUDED THAT AMOCO COMPLIED WITH THE PMPA IN TERMINATING THE DEALERSHIP CONTRACTS.

A. Evidence Of Financial Distress Is A Proper Ground For Termination Under The PMPA.

The PMPA prohibits termination of a franchise except on the basis of specifically enumerated grounds and compliance with certain notification requirements. *Brach* v. *Amoco Oil Co.*, 677 F.2d 1213, 1216 (7th Cir. 1982). Moody does not claim that the Seventh Circuit erred in concluding that Amoco met the notification requirements. Moody's only claim is that termination for "financial distress" was impermissible under the PMPA.

Section 2802(b)(2) of the PMPA sets forth grounds for termination. One of those grounds is: "The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise . . . is reasonable." 15 U.S.C. § 2802(b)(2)(C). Section 2802(c) defines the term "an event which is relevant to the franchise relationship . . ." by listing twelve examples. Section 2802(c) states that the definition "includes events *such as*" the twelve examples listed. (emphasis added) Clearly, events other than those listed may serve as grounds for termination. S. Rep. No. 731, 95th Cong., 2d Sess. 38, *reprinted in* 1978 U.S. Code Cong. & Ad. News 893, 896; *Brach*, 677 F.2d at 1219.

The PMPA expressly provides that failure "to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled" constitutes an event for which termination is a reasonable response. 15 U.S.C. § 2802(c)(8). As stated by the Seventh Circuit, the PMPA thus recognizes "that a franchisee's duty and

ability to pay are central to the franchise relationship." (App. at 33) Financial distress, as evidenced by a failure to cure dishonored checks, is a reasonable indicator of the franchisee's inability to continue to live up to his end of the franchise relationship.

Moody's failure to cure the dishonored checks clearly was not technical or unimportant to the franchise relationship. Moody ignores the fact that his dishonored checks cannot be viewed in a vacuum. At the time the checks were dishonored, Moody's corporation, Jermoo's Inc., already owed Amoco more than $270,000. Moody himself had personally guaranteed payment of this debt.[7] Then, Moody gave Amoco a series of bad checks. Despite receiving notice of the bad checks and demands to cure them within 5 days, Moody did not make good on the checks. The PMPA certainly should not be read to require a franchisor to continue to do business with a franchisee who is clearly unable to meet his financial obligations.

The security deposits which Amoco held on Moody's dealerships also did not render Moody's defaults technical or unimportant. Amoco could not apply the security deposits toward the bad checks so long as Moody was continuing to receive product from Amoco. Moody's references to "daily cash payment" terms is misleading. Product was never delivered to Moody C.O.D. After Moody's checks were dishonored, Amoco agreed to continue supplying Moody with product. He received the gasoline on bailment, with title remaining in Amoco until the gasoline was sold at retail. The "daily cash payment" to Amoco was for gasoline sold by Moody on the prior day. The

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[7] Relevant portions of the Unlimited Guaranty are reproduced at Supp. App. p. 2.

security deposits therefore continued to serve the function of protecting Amoco's interest in the gasoline in Moody's underground tanks. (App. at 8 n.5)

In an effort to convince this Court to intervene, Moody repeatedly stresses the purpose behind the PMPA—protecting franchisees from arbitrary or discriminatory termination. That purpose is not contravened by the Seventh Circuit's decision. Termination for financial distress is not arbitrary, nor does it evidence any form of discrimination. As noted by the Seventh Circuit in *Brach,* the courts must give deference to the legitimate business decisions of franchisors. 677 F.2d at 1223. When Moody bounced $18,000 worth of checks and failed to cure them, Amoco made a legitimate decision to terminate Moody's contracts. Three courts have already considered Moody's arguments about the technical or unimportant nature of his defaults. Three courts have refused to agree with Moody, even when applying the relaxed standard for injunctive relief under the PMPA. 15 U.S.C. § 2805(b). Moody has shown no abuse of discretion by the courts below.

B. The Seventh Circuit Properly Considered The $270,000 Jobbership Debt As Evidence Of Moody's Financial Distress.

Moody argues that the Seventh Circuit erred in considering the $270,000 debt on the jobbership as relevant to the question of whether Moody's defaults were technical or unimportant. He asserts that the Seventh Circuit was confused about who owned the jobbership. The Seventh Circuit knew precisely who the parties were and what they owned. It knew that Moody was the sole owner of Jermoo's Inc. (App. at 4); it knew that Moody had personally guaranteed payment of the jobbership's debt

to Amoco (Supp. App. at 3); it knew that the jobbership and the dealerships were governed by separate agreements (App. at 4); it knew who owned the dealerships. It had in front of it copies of the dealership and jobbership contracts. (*See* Appellant's Appendix, filed with the Seventh Circuit in conjunction with the appeal to that court).

In short, the Seventh Circuit made no mistake. It clearly did not view ownership of the contracts as controlling. The reality of the situation was that Amoco was dealing with Moody and was legally entitled to look to Moody personally for payment on the jobbership as well as the dealerships. The Seventh Circuit obviously believed that liability for payment under the contracts was of more significance than legal ownership. It is also noteworthy that, on petition for rehearing, Moody argued to the Seventh Circuit that it had mistakenly attributed ownership of the dealerships to Jermoo's Inc. (Supp. App. at 3) If the Seventh Circuit had indeed been confused about the relationship between the parties, it certainly would have corrected its error by granting a rehearing. The judges on the original panel were unanimous in voting to deny the petition for rehearing. (App. at 2)

C. Amoco Properly Relied On Financial Distress As The Ground For Termination.

In his petition to this Court, Moody argues that he should have been given 30 days to cure his bad checks because he was really guilty of "failure to make timely payment" rather than of exhibiting "financial distress." Moody does not argue that he thought he was being terminated under paragraph 15e of his contracts or that he did not understand his rights under the PMPA. (App. at

19) Instead, he argues that the result would be different if Amoco had relied on paragraph 15e instead of 15h. Moody confuses the issues.

The termination notices were issued on the basis of paragraph 15h, specifically dealing with reasonably convincing evidence of financial distress. The issue is whether termination under that provision complied with the PMPA. If it did, the inquiry is at an end. There is no need to evaluate a hypothetical termination under any other contract provision which Amoco might have relied upon. The Seventh Circuit properly decided the case based on the facts, as presented, not on what might have been. In doing so, it concluded that termination under paragraph 15h complied with the PMPA.

Moody's argument also confuses the provisions of his contracts with the requirements of the PMPA. The PMPA does not require that a franchisee be given a certain number of days to cure either nonpayment or payment "made" with a bad check. Nor does it require that a franchisor resort to the most liberal termination provision in its contracts when multiple grounds for termination exist. Moody is simply trying to read into the PMPA requirements which that statute does not impose.

Even if the giving of a bad check were viewed as a "failure to pay," the fact is that a number of checks, and thus a number of failures to pay, were involved. Moody's contracts allow 30 days to cure a failure to pay *only* upon notice of the first offense. (App. at 38, Lease ¶ 16d) Moody was sent more than one notice to cure bad checks. (App. at 6-7) The 30-day cure provision in paragraph 16d would not have applied to the second notice which was sent to Moody on February 2, 1983. (App. at 7) Under the terms of the contract, termination for "failure to pay" could have

properly occurred on the heels of the second notice of dishonored checks.

Hence, Moody's recharacterization of his defaults does not change a thing. The fact remains that Moody received the entire cure period to which he was entitled. Moody's statement that, under the Seventh Circuit's decision, he would have been better off not paying at all than attempting to pay with checks which were later dishonored is patently absurd.

IV. PRE-BANKRUPTCY TERMINATION UNDER THE PMPA BASED ON EVIDENCE OF FINANCIAL DISTRESS DOES NOT CONTRAVENE THE BANKRUPTCY CODE.

Moody forgets that his contracts were terminated pre-bankruptcy when he argues that the Seventh Circuit's decision is contrary to the Bankruptcy Code's prohibition against bankruptcy termination clauses. A debtor is not entitled to the protections of the Bankruptcy Code until he files bankruptcy petitions. 11 U.S.C. §§ 301 and 362. At that point, the Code protects the debtor's contracts from termination due to the bankruptcy. 11 U.S.C. §§ 362 and 365. In this case, however, Moody's contracts were terminated *before* he filed his bankruptcy petitions. He was not entitled to the Code's protections at the time of termination, nor was Amoco subject to the Code's prohibitions regarding post-bankruptcy terminations.

Because Moody's contracts were terminated *prior to* his bankruptcy, this case does not raise the question of whether Amoco could have terminated the contracts *due to* Moody's bankruptcy or due to post-bankruptcy "financial distress". Moody's suggestion that bankruptcy termination clauses, or provisions resembling them, are un-

enforceable even before a debtor files for bankruptcy defies logic and finds no support in the law.

Under the facts in this case, the provisions of the PMPA do not overlap, much less conflict, with the provisions of the Bankruptcy Code. Termination of Moody's contracts was completed under the PMPA before Moody availed himself of the protections of the Bankruptcy Code. Any conflict between the PMPA and the Bankruptcy Code should be resolved in the context of facts which actually give rise to a conflict, not on the basis of hypotheticals or supposition.

CONCLUSION

For the foregoing reasons, Respondent Amoco Oil Company respectfully requests that the Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Dated this ..... day of October, 1984.

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Supplemental Appendix

SUPPLEMENTAL APPENDIX

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District Manager

January 27, 1983

Mr. G. W. Moody
Jermoo's, Inc.
Hwy. 12 & 16 East
Mauston, Wisconsin 53948

Dear Mr. Moody:

Five checks payable to Amoco Oil Company have been returned to the bank for the reason that there are not sufficient funds in your account to cover. The checks are:

#20514	dated 1/17/83	— $7,006.02
#20543	dated 1/19/83	— $7,006.02
#20553	dated 1/20/83	— $7,006.02
#20550	dated 1/19/83	— $7,919.16
#20552	dated 1/19/83	— $3,062.89

Please consider this our demand that you remit to this office the funds necessary to cover said checks within five (5) days from the date hereof. Should you fail for any reason to remit such funds within the said five (5) day period, we will consider all remedies available to us pursuant to our contracts with you.

Sincerely,

/s/ B. E. Stevens
B. E. Stevens
District Manager

BES:cn

cc: Field Sales Manager — R.L. Pettis
Territory Manager #17 — D.W. Powell

EXCERPT FROM MOODY'S UNLIMITED GUARANTY

Unlimited Guaranty

For Value Received and to induce Amoco Oil Company (herein called the "Company") 200 E. Randolph, MC 6121, Chicago, Illinois 60601 (Address) to lend money or otherwise extend financial accommodation to or for the account of G. W. Moody d/b/a Jermoo's Inc. (Name) Highway 12 & 16 East, Mauston, Wisconsin 53948 (Address) (herein called the "Debtor"), The Undersigned Hereby Unconditionally Guarantee(s) Payment When Due, whether by declaration or otherwise, of any and all indebtedness, including interest thereon, of the Debtor to the Company, howsoever such indebtedness may arise, whether as principal, guarantor, indorser or otherwise, now or hereafter existing (all such indebtedness being herein called "Company Debt"), and agree(s) to pay all expenses (including attorneys' fees and legal expenses) incurred by the Company to collect the Debt and in enforcing this guaranty.

* * *

The Company may, from time to time, either before or after receipt of a notice of discontinuance of this guaranty, without notice to or consent of any of the undersigned, and without in any way affecting any of the undersigned's liability or the Company's rights hereunder: . . . resort to any or all of the undersigned for payment of any or all of the Debt, whether or not the Company shall have resorted to any property securing any of the Debt or shall have proceeded against any other of the undersigned or any other party primarily or secondarily liable on any of the Debt.

* * *

Signed and delivered at Mauston, Wisconsin this 24th day of April, 1981.

/s/ D. P. Ducommon
Witness

/s/ G.W. Moody
Hy. 12 & 16 Mauston

EXCERPT FROM DEBTOR'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC FILED WITH THE SEVENTH CIRCUIT (PAGES 2-3)

Basis For Rehearing

Although, as noted in the Court's decision, this appeal presented a variety of "complex and novel issues" (Slip Op. at 13), several of which the Court expressly found to be "close" (*Id.* at 13, 21), Moody's request for rehearing is focused on the single issue of entitlement to injunctive relief under the PMPA. The Court determined that Moody had failed to demonstrate the "fair ground for litigation" required to obtain injunctive relief under the PMPA to prevent the termination of his dealerships because of evidence that the dealerships were in financial distress. The Court's decision is flawed in three respects:

1. Even if "evidence of financial distress" were a valid basis for termination under the PMPA, this Court's conclusion that such evidence existed here is based on a factual misunderstanding about ownership of the dealerships. The Court's decision permits Amoco to terminate Moody's financially healthy dealership franchises based on evidence that the separate and distinct jobbership franchise owned by Jermoo's Inc. (a legally distinct entity) was in financial distress notwithstanding the fact that there is no cross-default provisions between the economically healthy and unhealthy franchises owned by the different entities. . . . (Footnote omitted).

11 U.S.C. § 1322

§ 1322. Contents of plan

(a) The plan shall—

(1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) provide for the full payment in deferred cash payments of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and

(3) if the plan classifies claims, provide the same treatment for each claim within a particular class.

(b) Subject to subsections (a) and (c) of this section, the plan may—

(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated;

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims;

(3) provide for the curing or waiving of any default;

(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any unsecured claim;

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

(6) provide for the payment of all or any part of any claim allowed under section 1305 of this title;

(7) provide for the assumption or rejection of any executory contract or unexpired lease of the debtor not previously rejected under section 365 of this title;

(8) provide for the payment of all or any part of a claim against the debtor from property of the estate or property of the debtor;

(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity; and

(10) include any other appropriate provision not inconsistent with this title.

(c) The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.

LIST OF AFFILIATES AND SUBSIDIARIES OF AMOCO

Westlake I, Limited
Southridge Park Associates, a Limited Partnership
Lake Barrington Shores, a Limited Partnership
Midwest Club, a Limited Partnership
Tangley Oaks, a Limited Partnership
Analog Devices Inc.
Cetus Corporation
Gigabit Logic, Inc.
Communications Standard Partnership
Packetcable, Inc.
Intersemix, S.A.
Solar Concentrator Corp.
Solarex Electric Ltd.
Solarex Pty. Ltd.
Solarex S.A.
Holecsol Components B.V.
Photonetics, S.A.
Societe-France Photon, S.A.
Solapak Ltd.
Dearborn Park Corporation
Illinois Neighborhood Development Corp.
Trout Lake Golf and Country Club
Alberta Underground Storage, Ltd.
Detour Lake Mining Project, Joint Venture
L.C.P. Operations, Ltd.
Nova, An Alberta Corporation
Pembalta Gas System No. 1, Ltd.
Pembalta Gas System No. 2, Ltd.
Pembalta Gas System No. 3, Ltd.
Pembalta Gas System No. 4, Ltd.
Pembalta Gas System No. 5, Ltd.
Pembalta Gas System No. 6, Ltd.
Pembalta Gas System No. 7, Ltd.
Pembalta Gas System No. 8, Ltd.
Progas, Ltd
Redwater Water Disposal Company Limited

Amoco Fina N.V.
Amoco Australia Limited
A G Intl. Chemical Company, Inc.
Far East Bulk Carriers, Inc.
Intercontinental Quimica S A
Singapore Petroleum Co. Pte. Ltd.
Singapore Refining Co. Pte. Ltd.
Mainline Pipelines Limited
Cliffe Storage Limited
Kharg Chemical Company Limited
Petroleum Storage Limited
Quimica Ltda.
China American Petrochemical Co. Ltd.
Samsung Petrochemical Co., Ltd.
Tereftalatos Mexicanos, S.A.
Ok Tedi Mining Ltd.
Ocean Minerals Company
Apache Powder Company
Cyprus Pima Mining Company
Hoffman Exploration and Minerals Ltd.
Madison Minerals, Incorporated
Nihon Mistron Company Ltd.
Rome Group, Inc.
Sierra Talc de Mexico S.A.
Sierra Monterey S.A.
White Pigment Corporation
Savannah Coal Port
Minera Cuicuilco S.A. de C.V.
Rio Blanco Oil Shale Company
Three Rivers Rock Company
ACM Services, Inc.
Madras Fertilizers Limited
Madras Refineries Limited
Atlas Supply Company
Fertilizers of Trinidad & Tobago Ltd.
Renaissance Center Partnership
Frontier Pipeline Company
Magee Finance Company
Seminole Pipeline Company
Chicap Pipe Line Company

Colonial Pipeline Company
Dixie Pipeline Company
West Shore Pipe Line Company
Wyco Pipe Line Company
Petrolera Curaray, S.A.
Ekma Oil Company
Gulf of Suez Petroleum Company
Rudeis Oil Company
Torsina Oil Company
Iran Pan American Oil Company
K 10A Production B.V.
Statfjord Transportation
Aimsa S.A. de C.V.
Amoco Exploration Zaire S.P.R.L.
East Texas Salt Water Disposal Co.
Gravcap, Inc.
Heat Transfer Research, Incorporated
Philippines Long-Distance Telephone Co.
Sultran, Ltd.
Abbott Pipe and Supply Company
Black Feet Indian Writing Co.
Cyclone Well Service Limited
De la Fuente, Inc.
F M 4 Gila River Corporation
Highland Community Bank
Indecorp, Inc.
Major Mill, Inc.
Red Man Pipe and Supply Company
R/P International Technologies, Inc.
Star/Adar Insulation Company
Superphone Corporation
Tac Systems, Inc.
Tenco Hydro Inc.
The Moreno Group, Inc.
Urban Enterprises Corporation
Washington National Bank of Chicago
XINIX, Incorporated